APPENDIX

IN THE

United States Court of Appeals

FOR THE SECOND CIRCUIT

No. 79-7777

THE COMMONWEALTH OF PUERTO RICO
on the relation of Carlos S. Quiros, Secretary,
Department of Labor and Human Resources,
Plaintiff-Appellant

v.

LOUIS BRAMKAMP, *et al.*
Defendants-Appellees

On Appeal from the United States District Court for the Southern District of New York

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BRIEF FOR THE SECRETARY OF LABOR AS AMICUS CURIAE

STATEMENT OF THE ISSUE

Whether the Commonwealth of Puerto Rico has standing to sue as *parens patriae* where it alleges a denial of its right to full participation in the United States Employment Service System resulting from a pattern of discriminatory actions by defendants against Puerto Rican citizens.

STATEMENT OF THE CASE

The Commonwealth of Puerto Rico has appealed from the district court's dismissal of its complaint against the defendants,

apple growers in New York State, for lack of standing. Puerto Rico, asserting that it had standing as *parens patriae,* alleged in its complaint that defendants had committed various violations of the Wagner-Peyser Act, 29 U.S.C. 49 *et seq.;* the Immigration and Nationality Act of 1952, as amended, 8 U.S.C. 1101 *et seq.,* and the labor certification and Wagner-Peyser Act regulations promulgated by the Secretary of Labor.

Essentially, Puerto Rico claimed that defendants deprived Puerto Rico of its "right to effectively participate in the benefits of the Federal Employment Service System of which it is a part and to serve as a supplier state for migrant farm workers in connection with a major crop" by discriminating against Puerto Rican workers regarding the terms of their employment, by improperly terminating the employment of Puerto Rican workers, and by refusing to offer jobs to Puerto Ricans during the 1978 apple harvest in New York State (J.A. 147). Puerto Rico sought declaratory and injunctive relief to prevent defendants from engaging in such actions during future apple harvests. The district court in this case, adopting the reasoning of the District Court for the Western District of Virginia in a companion case,[1] dismissed Puerto Rico's complaint for lack of standing as *parens patriae.* Puerto Rico appealed to this Court for reversal of the district court's order.

STATEMENT OF INTEREST

By letter dated February 5, 1981, this Court requested the Solicitor General of the United States to file a brief as amicus curiae on behalf of the appropriate government agency on the issues raised by this case. Because the Secretary of Labor has the principal federal responsibility for administration of the

[1] *Commonwealth of Puerto Rico, etc.* v. *Alfred L. Snapp & Son, Inc., et al.,* 469 F.Supp. 928 (1979). The Fourth Circuit subsequently reversed the district court's decision on the standing issue (632 F.2d 365 (1980)) and denied the defendant's petition for rehearing and suggestion for rehearing en banc. The defendants' petition for a writ of certiorari in *Snapp* is pending before the United States Supreme Court.

federal-state employment service system, and because of the Secretary's role in certifying the use of temporary foreign workers, the Secretary submits this brief as amicus curiae. In an effort to assist this Court in its consideration of this case, we will present an outline of the labor certification and employment service system, a history of Puerto Rican worker involvement in the East Coast apple harvest, and the government's view on the standing of Puerto Rico as *parens patriae* to bring this suit.

DISCUSSION

A. Certification of Temporary Foreign Workers

The primary responsibility for overseeing the admission of aliens into the United States, including those non-immigrants admitted to perform temporary work for an employer, lies with the Commissioner of the Immigration and Naturalization Service, pursuant to the Immigration and Nationality Act, 8 U.S.C. 1101 *et seq.* Under that statute, the INS may allow entry of temporary foreign agricultural workers when "unemployed persons capable of performing such service or labor cannot be found in this country . . . ." 8 U.S.C. 1101(a)(15)(H)(ii). The Commissioner has delegated to the Secretary of Labor the authority to certify whether domestic workers are available to fill positions which employers seek to fill with temporary foreign workers, and whether the employment of foreign workers in those positions would adversely affect the wages or working conditions of domestic workers. 8 C.F.R. 214.2(h)(3). The INS may use the information provided by the Secretary of Labor as a basis for denying or allowing the entry of temporary foreign workers.

The Secretary's regulations provide that an employer who wants to hire temporary foreign workers must file a job order and certification application with a state agency of the Federal-state employment service system created pursuant to the Wagner-Peyser Act, 29 U.S.C. 49 *et seq.;* 20 C.F.R. 655.0, 655.200, 655.201(a)(1). The state forwards the application to the Regional Administrator of the Department of Labor, and the Department decides whether or not to approve the certification after first making a determination as to the availability of

U.S. workers and the adverse effect of the employment of foreign workers on the wages and working conditions of U.S. workers. The Department advises the INS of its actions on temporary labor certifications and the INS makes the final determination whether to grant visas to foreign workers, 8 U.S.C. 1184(a); 8 C.F.R. 214.2(h)(3).

Pursuant to the mandate of the Immigration and Nationality Act, the Secretary's regulations regarding temporary labor certifications contain requirements which attempt to ensure that temporary foreign workers do not displace available domestic workers. Thus, the regulations require that an employer file certification applications with the state employment service agency in sufficient time to allow the agency to recruit domestic workers locally and through the intrastate and interstate employment service clearance systems established pursuant to the Wagner-Peyser Act. 20 C.F.R. 655.201(c). The regulations also require that a certification application be accompanied by a copy of the job offer that the employer intends to use to recruit domestic and foreign workers. 20 C.F.R. 655. 201(b)(1). The employer must offer domestic workers at least the same benefits as those offered foreign workers, and must not impose greater restrictions on domestic than foreign workers. 20 C.F.R. 655.202(a). An employer who applies for temporary labor certification must sign a set of assurances which provide, *inter alia,* that the employer will comply with applicable federal, state and local employment laws (20 C.F.R 655.203(b)), and that the employer will cooperate with the employment service system in the recruitment of U.S. workers (20 C.F.R. 655.203(d)). The assurances further provide that the job is open "to all qualified U.S. workers without regard to race, color, national origin, sex, or religion . . .", and that "[n]o U.S. worker will be rejected for employment for other than a lawful job related reason." 20 C.F.R. 655.203(c).[2]

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[2] The authority of the Secretary to impose minimum standards for accepting an employer's job offer has been recognized by the Attorney General (41 A.G. 406, 1959), and sustained by a number of courts. *E.g., Gomez* v. *Florida State Employment Service,* 417 F.2d 569 (5th Cir. 1969); *NAACP* v. *Brennan,* 360 F.Supp. 1006 (D.D.C. 1973).

The Secretary's regulations provide a penalty for an employer's noncompliance with the terms of a temporary labor certification. The Department of Labor may initiate an investigation when it has "probable cause to believe that an employer has not lived up to the terms of the temporary labor certification." 20 C.F.R. 655.210(a). If the Department determines that the employer is not in compliance, the sanction is to deny labor certification during the following year. 20 C.F.R. 655.210.

As noted above, an employer who applies for temporary labor certification must provide a copy of the job order which it will use to recruit workers, and must utilize the services of the federal-state employment service system to recruit available U.S. workers. While the job order does not constitute a contract to which the Department of Labor is a party or of which it is a guarantor, 45 Fed. Reg. 39466 (June 10, 1980), Department regulations provide for the investigation of all complaints relating to failure to comply with the terms of the job offer or other applicable provisions. 20 C.F.R. 658 *et seq.*[3] These regulations, which are applicable to all employment service activities, mandate the creation of a complaint system within all state employment service agencies and the Department of Labor.

An aggrieved individual may file a complaint with any state employment agency; but the complaint will be investigated by the state in which the alleged violation occurred.[4] For example, a Puerto Rican worker involved in the apple harvest in New York state could file a complaint in New York, or with the Puerto Rico employment agency upon his return. In the latter event, the Puerto Rico agency would forward the complaint to New York for processing. The state agency is

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[3] The employment service complaint system was revised in June, 1980. 45 Fed. Reg. 39469 (June 10, 1980).

[4] When an employer is alleged to have failed to comply with the terms of a temporary labor certification, the state agency notifies the Department of Labor so that it may determine whether the employer should be denied labor certification during the following year. 20 C.F.R. 658.501(c).

required by a 1980 amendment to the regulations to hold a hearing on all complaints which are not settled informally. The regulations provided in 1978 and still provide that a party may appeal the state's decision to the Regional Administrator of the Department of Labor, 20 C.F.R. 658.418(c), after he has exhausted his state remedies. 20 C.F.R. 658.421(a). The Department of Labor may conduct further investigation of and a hearing on the complaint. 20 C.F.R. 658.421(c) and (e), 658.424. The ultimate remedy available against an employer found to have failed to comply with the terms of a job order or to have committed other violations is the denial of access to the employment service system. This remedy is imposed by the state in accordance with federal regulations. 20 C.F.R. 658.501(a).

Citizens of Puerto Rico are United States citizens who, when available for work, are entitled to priority in employment over temporary foreign workers. The Commonwealth of Puerto Rico is considered a "state" for the purposes of recruitment and referral of workers through the federal-state employment system established by the Wagner-Peyser Act. 29 U.S.C. 49b(b). However, despite the rights accorded to Puerto Rican citizens by law, employment of Puerto Rican workers in the East Coast apple harvest has been problematic. As the Commonwealth acknowledged in its brief, before 1978, Puerto Rico Public Law 87 proved an impediment to the hiring of Puerto Rican workers for the apple harvest in that it imposed requirements on mainland employers beyond those mandated by federal law. The United States Department of Labor ruled that Puerto Ricans who insisted on these contract provisions were not "available" U.S. workers within the meaning of the Immigration and Nationality Act and the applicable federal regulations. The First Circuit upheld the Department's ruling. *Flecha* v. *Quiros,* 567 F. 2d 1154 (1977), cert. denied, 436 U.S. 945.

In July 1978, Puerto Rico amended Public Law 87 to allow waiver of that law's requirements, and Puerto Rico's Labor Secretary Quiros announced that apple growers whose job orders complied with the 1978 federal requirements would be exempted from the requirements of Public Law 87. Puerto

Rico here alleges that, notwithstanding that exemption, defendant growers engaged in widespread refusals to hire or dismissals of available Puerto Ricans in 1978.[5]

B. The Standing of Puerto Rico to Sue as *Parens Patriae*

Puerto Rico seeks standing to represent its citizens as *parens patriae* in this action. In such a suit, a state must possess a "quasi-sovereign" interest beyond that of its individual citizens. *Hawaii* v. *Standard Oil Co.*, 405 U.S. 251 (1977). In the case companion to the instant case, *Commonwealth* v. *Snapp*, both the district court and the Fourth Circuit recognized the Commonwealth's quasi-sovereign interest in the health of its endangered economy and the employment opportunities of its citizens. 632 F. 2d 365, 369-370 (1980), 469 F.Supp. 928, 932 (1979). While weighing the factors differently, the two courts agreed that the relevant considerations in deciding whether the sovereign's interest is justiciable are: the size of the affected population, the magnitude of the harm, and the ability of the injured citizens to obtain complete relief on their own. *Commonwealth* v. *Snapp*, 632 F.2d at 369, citing *Pennsylvania* v. *Kleppe*, 533 F.2d 668, 674-675 (D.C. Cir. 1976).

The interest of the federal government here appears to be relevant only to the last factor, the ability of the injured persons to obtain relief, either independently or through the auspices of the federal government. In the view of the Secretary of Labor, federal policy considerations do not weigh against granting the Commonwealth standing to pursue its action as *parens patriae*.

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[5] In 1979, the Puerto Rico employment agency did not recruit any Puerto Rican workers for the apple harvest because existing regulations under the Farm Labor Contractor Registration Act, 7 U.S.C. 2041 *et seq.*, arguably required the growers to obtain proof of citizenship. 29 C.F.R. 40.51(p). Before the 1980 harvest began, the FLCRA regulations were amended to establish the presumption that all workers recruited through the federal-state employment service system are U.S. citizens. 29 C.F.R. 40.51(p)(1)(xi). That fact, plus the new hearing requirement, are clearly improvements on the employment possibilities for Puerto Ricans since 1978.

To the extent that the Commonwealth has an interest "independent of and behind the titles of its citizens," *Georgia* v. *Tennessee Copper Co.*, 206 U.S. 230, 237 (1907), and "apart from that of the individuals affected," *Pennsylvania* v. *West Virginia*, 262 U.S. 553, 592 (1923), its interest neither infringes on nor is inconsistent with the federal interest, and not wholly remediable under the federal regulations pertaining to individual complaints.

As the Courts have recognized, the Congressional policy, while allowing foreign workers to enter the country temporarily, is "to prefer domestic workers in all fields." *Flecha* v. *Quiros*, 567 F.2d 1154, 1155 (1st Cir. 1977). Indeed, "the thrust of the entire statutory-regulatory framework" of the immigration laws is "to prevent the employment of seasonal foreign workers from having an adverse effect upon domestic workers." *Florida Sugar Cane League* v. *Usery*, 531 F.2d 299, 303-304 (5th Cir. 1976). Consistent with that objective, the Secretary of Labor's preeminent concern in the labor certification area must be the protection of the interests of those domestic workers, including Puerto Ricans. See *Elton Orchards* v. *Brennan*, 508 F.2d 493 (1st Cir. 1974). Obviously, in that regard, the federal interest and that of the Commonwealth are entirely consistent.

To pursue its objective, the Department has adopted regulations aimed at protecting U.S. workers and establishing a system for investigating and processing the complaints of individual workers. However, investigative resources are severely limited, and time pressures in short-term seasonal farm work are great. Although an aggrieved employee may obtain back pay through the complaint system by settlement or through threat of denial of access to the employment service system or of future temporary labor certification, the complaint system does not contemplate injunctive relief or attendant contempt proceedings.

Moreover, regardless of the efficacy of the system in handling individual complaints, these procedures were not intended to redress Puerto Rico's allegations of systemic mistreatment of Puerto Rican workers. The allegations in this complaint illustrate the difficulty the Department would have in

investigating an alleged pattern of misconduct involving hundreds of workers and dozens of employers spread over one or more states. These allegations, if true, would constitute violations of law, which could entitle plaintiff to an injunction enforceable by contempt proceedings. Such an adjudication could, of course, provide the basis for future denials of certification by the Labor Department. Presumably, most questions arising in such a lawsuit would be factual, but to the extent that federal law is adjudicated, the Secretary of Labor could intervene to protect federal interests. Thus, suit for injunctive relief to prohibit mistreatment of Puerto Rican workers would not interfere with the employment service complaint procedures, but instead would provide a forum for raising allegations of systemic practices which are not easily addressed through the complaint procedures.

We express no view on the very important question whether plaintiff Puerto Rico has stated a claim for relief, and no view on the underlying merits. Moreover, we must stress that if standing is appropriate in this case, it is so only because of these unique circumstances: (1) The allegations in the complaint go beyond isolated individual claims, and involve a widespread pattern of denial of Puerto Ricans' rights as domestic workers; (2) the individual's right to employment is not readily vindicated by post-hoc remedies, and the individuals whose rights are at issue are peculiarly unable, owing primarily to separation from the mainland, to pursue contractual or complaint remedies on their own; and (3) the relief sought does not run contrary to federal objectives or interfere with the federal regulatory scheme. Thus, in the Secretary's view, this ability to sue as *parens patriae* when the issues involved are the rights of U.S. workers and access to the employment service system, would not extend to all states. Rather, Puerto Rico's standing argument is based on its unique circumstances. Furthermore, granting standing to Puerto Rico in these limited circumstances in no way suggests any broader standing rights against any agency of the United States government or any other state. As the Commonwealth recognizes in its brief, a state's assertion of standing to sue another sovereign must be closely scrutinized and is extremely difficult to main-

tain, particularly against the Federal government (Br. 13, 27-28, and cases cited at Br. 28 n. 23), and against other states as well (Br. 30-32).

In sum, the Commonwealth's asserted interest in protecting its right to full participation in the United States Employment Service System neither infringes on nor is inconsistent with federal interests. Furthermore, the allegations in the Commonwealth's complaint go beyond individual claims of mistreatment which may be handled through the employment service complaint system, and involve allegations of systemic mistreatment of Puerto Rican workers. Finally, Puerto Rican workers are peculiarly unable, primarily because of their separation from the mainland, to seek contractual or complaint remedies. In these circumstances, the Secretary of Labor is of the view that federal policy considerations do not weigh against granting Puerto Rico standing to sue as *parens patriae.*

CONCLUSION

For the foregoing reasons, the Secretary of Labor would not object to this Court's granting Puerto Rico standing as *parens patriae* to seek equitable relief from an alleged pattern of misconduct by private parties toward Puerto Rican workers.

Respectfully submitted.

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CERTIFICATE OF SERVICE

I certify that copies of the Secretary's brief have been served this day, by mail, upon counsel at the addresses listed below:

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